

CITY OF TIGARD, OREGON

ORDINANCE NO. 02-21

AN ORDINANCE AMENDING ORDINANCE 96.09 EXHIBIT "A" (PURCHASING RULES) TO ALLOW DESIGN/BUILD OR CONSTRUCTION MANAGER/GENERAL CONTRACTOR (CM/GC) CONTRACTS.

WHEREAS, The City Council approved Ordinance 96.09 on February 27, 1996, which established purchasing rules of the Local Contract Review Board, and

WHEREAS, The Amending of Administrative Rules 10.010 changes the Request for Proposal process from an exception of the competitive bidding process too one of two competitive bidding processes.

WHEREAS, The addition of Section 35.000 sets forth the guidelines to allow, but not require, use of a process for Design/Build or Construction Manager/General Contractor (CM/GC) contracts for Public Improvement contracts.

NOW, THEREFORE, THE CITY OF TIGARD ORDAINS AS FOLLOWS:

SECTION 1: The Tigard City Council, acting as the Local Contract Review Board, does hereby amend Ordinance 96-09 as shown in the attached Exhibit "A".

SECTION 2: This ordinance shall be effective 30 days after its passage by the Council, signature by the Mayor, and posting by the City Recorder.

PASSED: By unanimous vote of all Council members present after being read by number and title only, this 28th day of May, 2002.

Catherine Wheatley
Catherine Wheatley, City Recorder

APPROVED: By Tigard City Council this 28th day of May, 2002.

James E. Griffith
James E. Griffith, Mayor

Approved as to form:

James V. Keenan
City Attorney

5/28/02
Date

EXHIBIT "A"

TIGARD LOCAL CONTRACT REVIEW BOARD ADMINISTRATIVE RULES

AR 10.000 CONTRACTS EXEMPT FROM COMPETITIVE BIDDING AND REQUIREMENTS CONTRACTS.

10.010 1. Exemptions And Definitions.

All public contracts shall be based upon competitive bidding or proposals except the following:

- a. Contracts made with other public agencies, including the State System of Higher Education, or the federal government.
- b. Contracts, which are exclusively for personal services as defined in Section 70.000. Such contracts may include incidental materials such as written reports, architectural or engineering renderings and similar supplemental materials.
- c. Contracts specifically exempt under these rules:
 - 10.015 Exemption Of Contracts Under Certain Dollar Amounts
 - 10.020 Contracts For Price Regulated Items
 - 10.025 Copyrighted Materials
 - 10.030 Library Aggregate Purchases-Library Periodicals
 - 10.035 Advertising Contracts
 - 10.040 Equipment Maintenance Repair And Overhaul
 - 10.045 Purchase of Used Personal Property
 - 10.050 Purchases Under Established Requirements Contracts
 - 10.055 Gasoline, Diesel Fuel, Heating Oil, Lubricants and Asphalt
 - 10.060 Requirements Contracts
 - 10.065 Investment Contracts
 - 10.070 Insurance Contracts
 - 10.075 Employee Benefit Insurance
 - 10.080 Data and Word Processing Contracts
 - 10.081 Telecommunications Systems Contracts
 - 10.082 Telecommunications Services
 - 10.083 Office Copier Purchases
 - 10.085 Single Seller of Product Required
 - 10.090 Contract Amendments (Including Change Orders and Extra Work)
 - 10.100 Affirmative Action Contracts
 - 10.105 Responsibility of Public Agencies
 - ~~10.110 Request for Proposal~~
 - 10.115 Purchase Off Contract By Other Public Agencies
 - 10.120 Oil or Hazardous Material Removal

AR 35.000 COMPETITIVE REQUEST FOR PROPOSAL

35.010 Requests for Proposal – When Authorized

The City may use a competitive request for proposal process for contracts for which price is not the sole consideration in awarding the contract. Public improvement contracts shall be awarded by competitive bidding and not by competitive proposals unless the contract qualifies as a Design/Build contract or a Construction Manager/General Contractor (CM/GC) contract. At the time of awarding a Design/Build or CM/GC contract, the Local Contract Review Board shall make the findings required by ORS 279.015 (2) at a public hearing for which notice has been provided as required by ORS 279.015(3). The proposed findings shall be available when notice of the public hearing is published.

35.020 RFP Requirements

The competitive request for proposal process shall comply with the following requirements:

1. Contractual requirements shall be stated clearly in the solicitation document.
2. Evaluation criteria to be applied in awarding the contract and the role of an evaluation committee shall be stated clearly in the solicitation document.
3. Criteria used to identify the proposal that best meets the public contracting needs may include by are not limited to cost, quality, service, compatibility, product reliability, operating efficiency and expansion potential.
4. The solicitation documents shall clearly state all complaint processes and remedies available.
5. The solicitation documents shall state the provisions made for vendors to comment on any specifications that they believe limit competition.
6. The selection process shall not inhibit competition or encourage favoritism and will result in cost savings to the City. The above shall be documented as findings in the contract administration record.
7. The procurement shall be advertised and a written solicitation document issued that invites the submission of sealed, written offers to be opened publicly at a designated time and place.

35.030 Competitive Negotiation

In a competitive proposal process, the City may utilize competitive negotiation, in which amendments and clarifications to proposals may be made as part of the interview and evaluation process in response to questions or request from the City. Contract terms may be negotiated to the extent allowed by the solicitation document, state law and City rules, provided that the general work scope remains the same and the field of competition does not change as a result of material changes to the requirements stated in the solicitation document. Terms that may be negotiated are

details of contract performance, methods of construction, timing, assignment of risk in specified areas, fee, and other matters, which effect cost or quality.

35.040 Evaluation Criteria

The evaluation criteria in a competitive proposal process may include, in addition to price: firm and personnel qualifications and experience on similar projects, adequacy of equipment and physical plant, quality of products or services, sources of supply, availability of key personnel, financial capacity including management performance history on other public and private contracts, safety records, project understanding, proposed methods of construction, proposed milestone dates, references, service and related matters which affect cost or quality or other evaluation criteria specifically provided in the solicitation document.

35.050 Design/Build

The City may award contracts for public improvements by the competitive proposal process if the scope of work of the contractor includes substantial design responsibilities.

1. The Design/Build process the City should only be used when the City anticipates three or more of the following benefits:
 - a. Obtaining, through a Design/Build team, engineering design, plan preparation, value engineering, construction engineering, construction, quality control, and required documentation as fully integrated functions;
 - b. Integrating value engineering suggestions into the design phase, as the construction contractor joins the project team early with design responsibilities under a team approach, with the potential of reducing contract changes;
 - c. Reducing the risk of design flaws, misunderstandings and conflicts inherent in construction contractors building from designs in which they have had no opportunity for input, with the potential of reducing contract claims;
 - d. Shortening project time as construction activity (early submittals, mobilization, subcontracting and advance work) commences prior to completion of a biddable design, or where a design solution is still required (as in complex or phased projects); or
 - e. Obtaining innovative design solutions through the collaboration of the contractor and design team, which would not otherwise be possible.
2. In addition to the evaluation criteria provided by AR 35.040, evaluation factors for a Design/Build contract may also include design professional qualifications, specialized experience, preliminary design submittals, technical merit, design/build team experience, possession of necessary licenses, and related matters which affect cost or quality or other evaluation criteria specifically provided in the solicitation document. If a proposer does not have the necessary professional licenses, the proposal may be considered provided that the proposer or the persons who will be doing the professional work obtain the necessary licenses by the time of contract award.

3. The Design/Build contracting process shall conform to the following:
- a. Design Services. The level or type of design services required shall be clearly defined within the solicitation and contract documents, along with a description of the level or type of design services previously performed for the project. The services to be performed shall be clearly delineated as either design specifications or performance standards, and performance measurements must be identified.
 - b. Professional Liability. The contract documents shall clearly identify the liability of design professionals with respect to the Design/Build contractor and/or owner, as well as requirements for professional liability insurance.
 - c. Risk Allocation. The contract documents shall clearly identify the extent to which the City requires an express indemnification from the Design/Build contractor for any failure to perform, including professional errors and omissions, design warranties, construction operations and faulty work claims.
 - d. Warranties. The contract documents shall clearly identify any express warranties to be made to the City on characteristics or capabilities of the completed project (regardless of whether errors occur as the result of improper design, construction or both), including any warranty that a design will be produced which meets the stated project performance and budget guidelines.
 - e. Privity of Contract. The contract documents shall clearly identify any third party beneficiary arrangements by which privity of contract may be established between the City and design professional when the design professional is not otherwise under contract directly with the City.
 - f. Incentives. The contract documents shall clearly identify any economic incentives and/or disincentives, the specific criteria, which apply and their relationship to other financial elements of the contract.
 - g. Honoraria. If provided for in the request for proposals, honoraria or stipends may be provided for early design submittals from qualified finalists.

35.060 Construction Manager/General Contractor

The City may award contracts for public improvements b the competitive proposal process if the General Contractor is to undertake substantial construction management responsibilities in addition to the usual duties of the general contractor. The CM/GC process should only be used if the CM/GC can be involved early in a development process involving a complex project (occupied structures, unusual coordination or technical complexities), projects with accelerated schedules, extremely costly projects, historic renovation, and other projects involving uncertainties that will allow cost savings and quicker construction through the use of a CM/GC.

- 1. In addition to the evaluation criteria listed in AR 35.040, the evaluation criteria for a CM/GC contract may also include the ability to respond to the technical complexity of unique character of the project, coordination of multiple disciplines, the time required to

commence and complete the improvement, and related matters which affect cost or quality or other evaluation criteria specifically provided in the solicitation document.

2. The CM/GC process adds specified construction manager services to traditional general contractor services, requiring full contract performance within a negotiated guaranteed maximum price (GMP). The basis for payment is reimbursable direct costs as defined under the contract, plus a fee constituting full payment for work and services rendered, which together shall not exceed the GMP.
3. The CM/GC contracting process shall conform to the following:
 - a. Setting the GMP. The GMP shall be set at an identified time consistent with industry practice and shall define with particularity both what is included and excluded from the GMP. A set of drawings and specifications shall be produced establishing the GMP scope.
 - b. Adjustments to the GMP. The contract documents shall clearly identify the standards or factors under which changes or additional work shall be considered outside of the work scope to warrant an increase in the GMP, as well as criteria for decreasing the GMP. The GMP shall not be increased without a concomitant increase to the scope defined at the time the GMP was established.
 - c. Cost Savings. The contract documents shall clearly identify the disposition of any cost savings resulting from completion of the work below the GMP; that is, under what circumstances, if any, the CM/GC might share in those cost savings, or whether they accrue only to the City's benefit. Unless there is a clearly articulated reason for sharing the cost savings, the cost savings shall accrue to the City.
 - d. Cost Reimbursement. The contract documents shall clearly identify what items or categories of items are eligible for cost reimbursement with the GMP, including any category of general conditions (a general grouping of direct costs which are not separately invoiced, subcontracted or included within either overhead or fee), and may also incorporate a mutually agreeable cost reimbursement standard.
 - e. Audit. Cost reimbursements shall be made subject to final audit adjustment, and the contract documents shall establish an audit process to ensure that contract costs are allowable, properly allocated and reasonable.
 - f. Fee. Compensation for the CM/GC's services shall be paid on the basis of a fee, which is inclusive of profit, overhead, and all other indirect or non-reimbursable costs. The fee, first expressed as a proposed percentage of all reimbursable costs, shall be identified during and become an element of the selection process. It shall subsequently be expressed as a fixed amount when reimbursable costs are established within the GMP.
 - g. Incentives. The contract documents shall clearly identify any economic incentives, the specific criteria, which apply, and their relationship to other financial elements of the contract (including the GMP).

- h. Controlled Insurance Programs. For projects anticipated to exceed \$75 million, the contract documents shall clearly identify whether a City controlled or contractor controlled insurance program is anticipated or allowable. If so, those documents shall clearly identify:
 - (1) Anticipated cost savings from reduced premiums, claims reductions and other factors,
 - (2) The allocation of cost savings, and
 - (3) Safety responsibilities and/or incentives.
- i. Early Work. The RFP shall clearly identify the circumstances under which any of the following activities may be authorized and undertaken for compensation prior to establishing the GMP:
 - (1) Early procurement of materials and supplies;
 - (2) Early release of bid packages for such things as site development; and
 - (3) Other advance work related to critical components of the contract.
- j. Subcontractor Selection. The contract documents shall clearly describe the methods by which the CM/GC shall publicly receive, open and record sealed bids or price quotations, and competitively select subcontractors to perform the contract work based upon price, as well as the mechanisms by which the City may waive those requirements. The documents shall also describe completely the methods by which the CM/GC and its affiliated or subsidiary entities may compete to perform the work, including, at a minimum, advance notice to the public of the CM/GC's intent to compete and a public opening of bids or price quotations by an independent party.
- k. Subcontractor Approvals and Protests. The contract documents shall clearly establish whether the City is required to approve subcontract awards, and to what extent, if any, the City shall resolve procurement protests of subcontractors and suppliers. The related procedures and reporting mechanisms shall be established with certainty, including whether the CM/GC acts as the City's agent in this process and whether the CM/GC's subcontracting records are considered to be public records. In any event, the City shall retain the right to monitor the subcontracting process in order to protect the City's interests.
- l. Socio-Economic Programs. The contract shall clearly identify conditions relating to any required socio-economic programs (such as Affirmative Action or Prison Inmate Labor Programs), including the manner in which such programs affect the CM/GC's subcontracting requirements, the enforcement mechanisms available, and the respective responsibilities of the CM/GC and the City.

35.070 CM/GC and Design/Build Subcontracting

The contract with the contractor on a CM/GC contract or a Design/Build contract shall describe the methods by which the CM/GC or Design/Build firm shall competitively select other contractors and subcontractors to perform work on the public improvement. The contract shall also describe completely the methods by which the CM/GC or the Design/Build firm and its affiliated and subsidiary entities, if any, may compete to perform the work of the public improvement. Such methods shall include at a minimum, public opening of sealed bids at a pre-announced time and place.

35.080 Post-Project Evaluation

Upon completion of and final payment for any public improvement contract in excess of \$100,000 for which the City did not use the competitive bidding process, the City shall prepare and deliver to the LCRB, within 30 days of project acceptance, an evaluation of the public improvement project. The evaluation shall include:

1. Financial information, consisting of cost estimates, any guaranteed maximum price, changes and actual costs;
2. A narrative description of successes and failures during design, engineering and construction; and
3. An objective assessment of the use of the alternative contracting method as to whether the alternative contracting method:
 - a. Encouraged favoritism or substantially diminished competition for public contracts; and
 - b. Resulted in cost savings to the City.

Evaluations required by this section shall be made available for public inspection.

35.090 Pricing Mechanisms

1. A Request for Proposal may result in a firm fixed price (lump sum) contract as in the case of competitive bidding. Alternatively, the award may be based on a cost reimbursement contract (that is, a cost plus fixed fee contract in which additional costs beyond those estimated are reimbursable while the fee does not increase for the original work scope).
2. Economic incentives or disincentives may be included to reflect stated City purposes related to time of completion, safety or other public contracting objectives including total least cost mechanisms such as life cycle costing.
3. A guaranteed maximum price (GMP) shall be in all CM/GC and Design/Build contracts and may be included in other contracts.
 - a. In CM/GC, unless otherwise directed by the City, the pricing mechanism shall be a cost plus fixed fee contract with a GMP.

- b. In Design/Build, unless otherwise directed by the City, the pricing mechanism shall be a lump sum contract with GMP.
- c. The GMP may be negotiated as provided in AR 35.030. If no GMP can be agreed to with the highest-ranked proposer, the City may proceed to negotiate with the proposer that was next ranked in the original selection process, or employ other suitable means for entering into a contract.
- d. When cost reimbursement contracts are utilized, regardless of whether a GMP is included, the City shall provide for audit control which will effectively verify rates and ensure that costs are reasonable, allowable and properly allocated.